

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

MARIO E. FALSETTA,

(your name)

Appellant.

No. 42330-8-II

STATE OF WASHINGTON

BY [Signature]
DEPUTY

STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

I, Mario Falsetta, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Additional Ground 2

If there are additional grounds, a brief summary is attached to this statement.

Date: 12-21-11

Signature: [Signature]

A) Under Delmarter The State Failed To Prove Beyond A Reasonable Doubt That The Circumstantial And Direct Evidence As Well As Mr. Falsetta's Conduct Could Have Raised A Rational Trier Of Fact That Could Have Found The Essential Element Of Intent Required For Identity Theft.

"Sufficiency of the evidence is a question of constitutional magnitude because due process requires the state to prove its case beyond a reasonable doubt." In re Pers. Restraint of Tortorelli, 149 Wn.2d 82, 93, 66 P.3d 606 (2003). The evidence is insufficient if, when reviewed in the light most favorable to the State, "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Id., at 93 (quoting State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). The specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We may infer criminal intent from conduct, and circumstantial evidence as well as

direct evidence carries equal weight. State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004); see Delmarter, Id at 638. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from that evidence. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). [T]he critical inquiry on review of the sufficiency of evidence to support criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilty beyond a reasonable doubt. Jackson v. Virginia, 44 U.S. 307, 318, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis added); see State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

If an appellate court reverses a conviction based upon insufficiency of the evidence, a retrial is not permissible under this doctrine. Hudson v. Louisiana, 450 U.S. 40, 67 L.Ed.2d 30, 101 S.Ct. 970 (1981); Burks v. United States, 437 U.S. 1, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1978); Washington v. Anderson, 96 Wn.2d 739, 749, 638 P.2d 1205 (1982).

In State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980), the Court ruled that, "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." Id, at 638.

Applying that rule to Mr. Falsetta, the Court must conclude that the evidence in the case is sufficient to indicate as a matter of logical probability from Mr. Falsetta's conduct an intent to use Deguis' and Smith's credit cards and financial information to commit, or to aid or abet, a crime.

RCW 9.35.020 - Identity Theft - provides in pertinent part:

(1) "No person may knowingly obtain, possess, use or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or aid or abet, any crime."

RCW 9.35.020 (1)(underline added).

The language of the statute reveals that the legislature intended to establish an offense which has two elements--first, the accused must have engaged in a proscribed act involving another's means of identification or financial information and, second the accused must have done so with

the intent to commit, or to aid or abet, a crime.

State v. Leyda, 157 Wn.2d 335, 138 P.3d 610

(2006)(underline added). An "essential element is one whose specification is necessary to establish the very illegality of the behavior."

State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir. 1983)).

Here, Mr.Falsetta volunteered that he knew the items, (credit cards and drivers license belonging to Michelle Dequis), were in the room, but did not know who they belonged to and did not think it was right to throw them away. (03/23/11 RP 35). Mr.Falsetta further told Deputy William Ruder that he had been staying in the room for just two months, and that he know the documents, (financial documents, gift cards and drivers license belonging to Beverly Smith), were in the tin but did not intend to use them. (03/23/11 RP 118).

CCO officer Ryan Kowaluch nor Deputy William Ruder could say who took the items from Dequis and Smith, or how the items came to be in Mr.Falsetta's room. (03/23/11 RP 81, 123, 127).

Neither Kowalchack nor Ruder could say whether Mr.Falsetta ever used Dequis' credit cards or Smith's financial information, or if he ever intended to use them. (03/23/11 RP 81, 82, 83, 123).

Mr.Falsetta's sister, Brianna Davis, and her friend Courtney Brown, testified that they found Dequis' credit cards in the Walmart bathroom. (03/23/11 RP 156, 157, 158, 175, 177). Courtney Brown testified she put the cards on the table of the Davis' house and then forgot about them the next day. (03/24/11 RP 160). Further, Davis testified that Mr.Falsetta had only been staying in the room for a short time. (03/24/11 RP 180-81). That another man of questionable character had been staying in the room before Mr.Falsetta moved in. (03/24/11 RP 182-83).

In previous cases involving Identity Theft, our Courts have found that the defendant must show intent to commit, or to aid or abet, a crime with another persons means of identity and financial information. See State v. Allenbech, 136 Wn.App. 95,147 P.3d 644 (2006) (viewing the evidence in the light most favorable to the prosecution, the

evidence was sufficient for a rational trier of fact to find that Allenbach had both intent to defraud and knowledge that the check was forged); State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003) (Identity theft only requires use of a means of identification with the intent to commit an unlawful act).

The conduct of Mr.Falsetta plainly indicated in the record evidence clearly does not support Mr.Falsetta intended to commit any crime with the credit cards or financial information. Neither the CCO or Sheriff's Deputy testified or presented any direct or circumstantial evidence to prove beyond a reasonable doubt that Mr.Falsetta intended to use the credit cards or financial information to commit, or to aid or abet, a crime.

The State failed to prove Mr.Falsetta intended to commit any crime with the credit cards and financial information of Dequis and Smith. Due process requires the State to prove its case beyond a reasonable doubt. Tortorelli, supra at 93. After viewing the evidence in the most favorable to the State, no rational trier of fact exists that could have found Mr.Falsetta intended

to commit, or to aid or abet, any crime with the items of Dequis and Smith beyond a reasonable doubt. The evidence is insufficient. Id, at 93 (quoting Green, supra at 221).

Mr. Falsetta has been convicted of Identity Theft without sufficient evidence to prove beyond a reasonable doubt the essential elements of Identity Theft. Johnson, supra at 147 (citing Cina, supra at 859). Mr. Falsetta's two Counts of Identity Theft in the Second Degree must be reversed. As the reversal is based upon insufficient evidence, retrial for the same offense or a lesser offense is not permissible under the doctrine. Hudson, supra; Burks, supra; Anderson, supra at 749.

A) Mr. Falsetta's Trial Counsels Failure To Raise The Issue Of Delmarter Before The Trial Court Amounts To Ineffective Assistance Of Counsel.

A criminal defendant who claims ineffective assistance of counsel must prove that (1) the attorney's performance was so deficient that it "fell below an objective standard of

reasonableness" and (2) the attorney's deficient performance prejudiced the defendant. State v. Reichenback, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)), which adopted the test set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006).

Here, there was no reason for trial counsel to have not raised the issue of Delmarter set forth hereinabove in § A, so it can not be assumed that such omission was a trial strategy within the discretion of the defense counsel. The entire record evidence failed to prove beyond a reasonable doubt any trier of fact establishing the intent required as an essential element of Identity Theft. Johnson, supra at 147 (citing Cina, supra at 859). As trial counsel failed to present the issue at trial, the Court was unable to make such a finding, resulted in Mr. Falsetta's injustice. Mr. Falsetta's prejudice is a 29 to 22 month difference. This results in a violation of due process, i.e. a complete miscarriage of

justice.

As set forth in § A hereinabove, there is a probable likelihood that the trial Court would have found the evidence to be insufficient to convict Mr.Falsetta of Identity Theft in the Second Degree.

Mr.Falsetta is prejudiced as a result of trial counsel's deficient performance at trial. The trial Court imposed a sentence of 51 months. (CP 88, 91; 06/3/11 RP 13). However, with Delmarter the evidence is insufficient violating Mr. Falsetta's due process rights and equating the difference between a 51 month sentence and a 29-22 month sentence. The error cannot be considered harmless.

Because there was no justifiable excuse for trial counsel to have not raised sufficiency of the evidence under Delmarter, counsels performance was deficient. Because the trial Court likely would have found the entire record evidence was insufficient to convict Mr.Falsetta of Identity Theft in the Second Degree had Delmarter been raised, both prongs under Strickland have been met and the Court should reverse the

conviction of Identity Theft in the Second Degree to remedy Mr.Falsetta's current prejudice stemming from such ineffective assistance of Mr.Falsetta's trial counsel.

CONCLUSION

As set forth in § A hereinabove, Mr. Falsetta's conduct in the entire record evidence fails to prove any rational trier of fact that Mr.Falsetta intended to commit, or to aid or abet, any crime with Dequis' and Smith's credit cards and financial information beyond a reasonable doubt. Based upon the entire record evidence plainly indicating the evidence is insufficient to prove beyond a reasonable doubt the essential elements required in Identity Theft, the conviction must be reversed and retrial is not permissible for the same offense or lesser offense. Hudson, supra; Burks, supra; Anderson, supra at 749.

Because Mr.Falsetta's trial counsel failed to raise the issue of Delmarter at trial, the record is sufficient for the Court to decide the evidence and intent of Mr.Falsetta is insufficient to have been convicted of Identity Theft.

Mr.Falsetta was prejudice from the trial
counsel's deficient performance that was below
an objective standard of reasonableness.

Based upon the foregoing, Mr.Falsetta's
convictions of Identity Theft in the Second Degree
should be reversed. Mr.Falsetta respectfully
requests so.

Dated this ____ day of _____, 2011.

MARIO ELLIOTT FALSETTA.
c/o[_____,SCCC,_____
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Aberdeen, WA (98520)]